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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

APR 26 1994

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In re Request of )

AMERICAN PERSONAL COMMUNICATIONS )

For a Pioneer's Preference )  
In the Licensing Process for )  
Personal Communications Services )

Gen. Docket  
90-314  
No. PP-06

TO: The Commission

COMMENTS ON PETITIONS FOR RECONSIDERATION

The Commission's final designation of American Personal Communications ("APC")<sup>1/</sup> as a pioneer in personal communications services ("PCS") was an appropriate recognition of the contributions APC has made both to the PCS industry and to the Commission's efforts to bring PCS to the American public. The few petitions for reconsideration that were filed concerning APC's preference provide no basis for disturbing that correct and proper decision.<sup>2/</sup>

Only one of the seven petitioners, ACT, asks the Commission to reverse the grant of a preference to APC. ACT's

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<sup>1/</sup> American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership in which APC, Inc. is the managing general partner and The Washington Post Company is an investor/limited partner.

<sup>2/</sup> APC here replies to petitions filed by Advanced Cordless Technologies, Inc. ("ACT"), Nextel Communications, Inc. ("Nextel"), QUALCOMM Incorporated ("QUALCOMM") and Advanced Mobilcomm Technologies, Inc./Digital Spread Spectrum Technologies, Inc. ("AMT/DSST"). Corporate Technology Partners filed a petition for reconsideration on April 7, 1994, but that petition has not been placed on public notice. APC will reply to it when and if comments are sought.

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petition, however, is based solely on a legally incorrect and factually insufficient view of the Commission's ex parte requirements.<sup>3/</sup> As we have demonstrated in response to similarly baseless charges by Pacific Bell and as we show here, these claims provide no basis for reconsidering the grant of a preference to APC. Although we respond to certain issues raised by AMT/DSST and Nextel, nothing in those petitions calls into question the grant of a preference to APC. There is thus no basis in the record for reconsidering APC's preference, and the Third Report should stand.

I. ACT'S CLAIMS OF IMPROPER EX PARTE CONTACTS  
PROVIDE NO BASIS FOR RECONSIDERING THE GRANT OF  
A PREFERENCE TO APC.

APC has scrupulously complied with the Commission's ex parte rules and policies. In claiming to the contrary, ACT relies upon no evidence but merely parrots the baseless allegations earlier raised by Pacific Bell. APC has responded to those claims and will not repeat its response here.<sup>4/</sup> The kernel of what ACT advances in support of this allegation is the "rumor" that "the lobbying in this proceeding has been fierce" (p. 20). ACT admits that it "cannot sustain a petition of alleged wrongdoing on the basis of a rumor" and so

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<sup>3/</sup> Indeed, it is questionable whether ACT has standing to raise any of these claims against APC. Its preference request could be granted without requiring any modification to APC's preference.

<sup>4/</sup> APC's responses of February 4, 1994, March 8, 1994 and March 25, 1994 to Pacific Bell are incorporated herein by reference.

asks the Commission to consider "what we have at this juncture" (p. 20). What ACT has, however, is unsupported innuendo and a misconception of the ex parte rules.

ACT acknowledges that preference awards and the pioneer preference rule making are two separate proceedings and that, while the issue of who should receive a pioneer's preference could not be discussed, "the merits of the . . . rule making proceeding were not restricted and it was permissible to make contacts regarding that subject matter."<sup>5/</sup> However, ACT then asserts that "such a bifurcation is deceptive and not real" and claims that this "deception" transforms permissible ex parte contacts about preference rules into impermissible contacts about preference awards.

In other words, ACT argues that APC's contacts could not really have been about the "esoteric and antiseptic question of whether preferences should be abandoned retroactively" (p. 24). But these issues, which ACT admits could be discussed, are precisely what APC and the Commission cared about -- such fundamental issues as whether the pioneer's preference rules should be eliminated or amended; whether any changes in the rules should be applied to existing

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<sup>5/</sup> Id. at 22. The Commission designated Docket 93-266 a "non-restricted" proceeding in Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, 8 F.C.C. Rcd. 7692 (1993) (the "Notice").

pioneer's preference requests; and whether the scope of awards to pioneers should be modified.<sup>6/</sup>

The Commission's Notice did not ask about the merits of APC's preference request or anybody else's; there was no indication that that issue underlay the Commission's Notice; and APC most assuredly did not discuss the merits of its request. If ACT's complaint is that one can't separate the generic preference rule making issues from the merits of individual preferences, its complaint lies with the Commission, which issued the Notice on the basis of that distinction. APC played by the rules as properly established by the Commission.<sup>7/</sup>

As for ACT's claims that a party is incapable of remaining silent on one issue while speaking on another, the Commission long ago dismissed these concerns by permitting a party to a restricted proceeding to make its views known in related non-restricted rule making proceedings so long as the

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<sup>6/</sup> Notice, 8 F.C.C. Rcd. at 7692-94, 7694-95, 7693-94.

<sup>7/</sup> ACT's suggestion that the Commission's potential elimination or scaling back of the hotly debated preference policy did not warrant comment scarcely requires a response. Interest in pioneer preference policy issues preceded and has survived the awards. The Commission sought and APC and others expressed comments on the issue of whether the preference rules should be abolished or modified. APC did not discuss the merits of any preference request, including its own.

merits of the restricted proceeding are not discussed.<sup>8/</sup> The General Counsel recently has reaffirmed this proposition.<sup>9/</sup>

APC was careful to fully honor the line the Commission has drawn between restricted and non-restricted proceedings. In two meetings with the Commission's Office of General Counsel, APC confirmed this distinction, and APC frequently reaffirmed it with Commission personnel before addressing permissible rule making topics. By the time APC held its first discussion on these topics, it had filed a paper that described its arguments in favor of maintaining the preference rules and granting preference awards of significant scope.<sup>10/</sup> At all times, APC's positions on the rule making topics discussed were in the public record.

ACT submits a tally of the number of ex parte notices filed by APC in ET Docket 93-266, a non-restricted proceeding, as if this number revealed anything but an active docket in which the Commission specifically invited ex parte

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<sup>8/</sup> See Ex Parte Communications and Presentations in Commission Proceedings, Report & Order, 2 F.C.C. Rcd. 3011, 3012 (1987); see also Report & Order, 1 F.C.C. 49, 58 (1965).

<sup>9/</sup> See Letter from Renee Licht, FCC Acting General Counsel, to Robert A. Mazer, Nov. 18, 1993 (applicants for low-earth orbit satellite service could permissibly discuss general LEO rule making issues without raising an ex parte concern).

<sup>10/</sup> APC Position Paper, filed September 27, 1993, Gen. Docket 90-314. This paper was filed in Gen. Docket 90-314 rather than in ET Docket 93-266 because the latter docket did not exist until October 21, 1993. APC filed a second position paper on these same topics on October 4, 1993 and a Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues in ET Docket 93-266 on October 28, 1993.

visits.<sup>11/</sup> The issue is not how many contacts APC had, but whether discussions were limited to permissible topics.<sup>12/</sup> APC's meetings with Commission personnel dealt entirely with permissible rule making issues, and ACT can point to no facts at all to the contrary because those facts do not exist.

Those who have opposed APC's preference and APC's general PCS proposal also have reported numerous ex parte contacts. Bell Atlantic reported 32 ex parte contacts in 1993 and 6 in the first quarter of 1994; Pacific Bell reported 19 in 1993 and 10 in the first quarter of 1994; CTIA reported 68 in 1993 and 18 in the first quarter of 1994. These numbers do not demonstrate that any of these parties crossed the line between permissible rule making topics and the merits of an individual preference request. Similarly, the number of notifications APC filed has no bearing on the propriety of the topics discussed in its meetings.

ACT's argument misses its mark on other counts as well. First, ACT fails to point out that APC made only one contact in the month before it was tentatively awarded a pioneer's preference on October 8, 1992, and that was about PCS rule making issues. Second, ACT fails to point out that

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<sup>11/</sup> See Remarks of Commissioner Duggan at FCC Open Meeting, Oct. 21, 1993 ("I invite not only comments from all the parties, but I invite visits to my office and every effort to convince me and to argue").

<sup>12/</sup> ACT also skews its analysis by including contacts by PCS Action, Inc., an organization of which APC is a member, but which has never taken a position on preference issues.

APC had far more contacts in the month before the PCS rule making decision than in the month before the preference rule making decision. Third, ACT's claim that APC "stop[ped] abruptly" making contacts after December 23, 1993, ignores the fact that APC resumed making permissible contacts after the holidays to discuss PCS rule making issues.

ACT also criticizes APC's ex parte notifications. Under a correct reading of the Commission's rules, APC's notices were more than sufficient. But ACT does not read Section 1.1206(a)(2) correctly. It paraphrases the rule as requiring "that a written report be filed concerning contacts that are made" (p. 25). In fact, the rule contains no such requirement. It unambiguously states:

Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings shall provide on the day of the oral presentation an original and one copy of a written memorandum . . .

Moreover, in adopting the rule, the Commission made it clear that "persons making oral presentations that substantially reiterate their own written comments need not file such a memorandum."<sup>13/</sup>

When APC limited its discussions to matters that were contained in its documents already on file, APC was not required by the Commission's Rules to file any notifications whatsoever. APC, however, for the sake of complete

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<sup>13/</sup> First Report, 2 F.C.C. Rcd. 3021, 3032 (1982).

disclosure, chose to report any meetings that occurred even if the contacts with Commission personnel were quite casual and did not constitute "presentations" in a formal sense. On those few occasions when APC's discussions raised matters that were outside the scope of its filed submissions, those matters were properly summarized in APC's notifications.

II. OTHER PETITIONS SIMILARLY PROVIDE NO BASIS FOR RECONSIDERING THE GRANT OF APC'S PREFERENCE.

Other petitions urge the grant of preferences to others. APC takes no position on the merits of these preference requests, but must respond where the petitions address APC's request.

AMT/DSST. To support its claim that the Commission penalized it for proposing a spectrum plan that varies from the Commission's plan, AMT/DSST states that APC's proposal also varied from the Commission's plan because APC proposed 50 MHz spectrum blocks when it applied for its preference in November 1991 (p. 18). APC, however, amended its proposal to propose two 40 MHz MTA spectrum blocks. The Commission's decision to allocate two 30 MHz MTA spectrum blocks with the capacity to aggregate up to 40 MHz per licensee is a reasonable outgrowth of APC's proposal.<sup>14/</sup>

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<sup>14/</sup> AMT/DSST asks the Commission in the summary, but not the body of its petition, to reconsider the grant to APC, Cox Enterprises, Inc. and Omnipoint Communications, Inc. only "to the extent that such grants are based on an inconsistent application of relevant criteria . . . or on a record tainted by procedural inadequacies" (p. i). AMT/DSST does not detail those inadequacies or demonstrate how a grant to APC cannot be squared with a grant to AMT/DSST. Even a grant of AMT/DSST's



Nextel. Although Nextel's digital mobile technology may be innovative in its ability to permit SMR systems to co-exist, we disagree with Nextel (pp. 7-10) that it is more innovative for PCS than APC's PathGuard™ System. Even if, however, the Commission were to award Nextel a preference for its technology, such an award would not detract from the value of APC's development of a technology that permits sharing between two very unlike services -- PCS and point-to-point microwave.<sup>15/</sup> Accordingly, Nextel's comparison of its technology to PathGuard™ provides no basis for reconsidering the grant of a preference to APC.

\* \* \*

The petitions present no grounds for reconsidering the grant of a preference to APC. Over the past four and one-half years, APC has located the spectrum in which PCS will be implemented, demonstrated how that spectrum can be used to inaugurate PCS, and invented the technology by which that spectrum can be shared.<sup>16/</sup> It has crafted effective sharing

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request thus would not require reconsideration of APC' grant.

<sup>15/</sup> Indeed, Nextel stated at an earlier juncture in this docket that it "does not contest the Commission's tentative award of PCS pioneer's preferences to APC, Cox and Omnipoint." Comments of Fleet Call, Inc., p. 6 (Jan. 29, 1993).

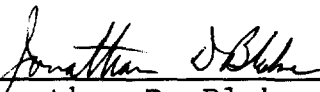
<sup>16/</sup> QUALCOMM notes that it "designed, developed, manufactured and installed the CDMA system that APC used to verify its FAST technology" and that its engineers "worked side-by-side with APC personnel to conduct the tests reported on by APC" (p. 3 n.9). We hope that these remarks do not convey the impression that QUALCOMM engineers had anything to do with the development of the FAST (now PathGuard™) System, as contrasted with the development of the CDMA interface APC

criteria and has done groundbreaking propagation research. It has deployed two experimental PCS systems, both serving the Washington, D.C./Baltimore, Maryland region, and has implemented three distinct PCS services used by several hundred test subjects on those systems. It has conducted substantial, state-of-the-art market trials to gauge consumer demand. All of this information it has submitted to the Commission for its use and for the benefit of the public. APC also has proposed and continues to propose comprehensive resolutions for regulatory issues confronting the Commission.

In short, APC has done all the work the Commission could ask of a PCS pioneer. The Commission should affirm APC's preference.

Respectfully submitted,

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utilized to test the PathGuard™ System. APC alone developed PathGuard™ (although QUALCOMM hardware was, of course, useful in verifying, but not developing, PathGuard™).

CERTIFICATE OF SERVICE

I, Kurt A. Wimmer, hereby certify that a copy of the foregoing pleading has been sent by hand delivery, facsimile and Federal Express (\*) or Federal Express (\*\*) to the following on this 26th day of April, 1994:

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